IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-70

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

FLOYD SANTNER, M.D.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Pennsylvania Courts hold that a search warrant must set out "with exacting particularity the precise item to be seized", or did the Pennsylvania Courts merely hold that a search warrant is void where the scope of its authority exceeds the probable cause in support thereof?

2. Is suppression of all of the business records of a physician seized pursuant to an overly broad search warrant an appropriate remedy to preserve and protect the Fourth Amendment interests of the Respondent?

3. Is there any necessity for this Court to issue a Writ of Certiorari to review a Pennsylvania Appellate Court decision which was consistent with prevailing federal authority?

4. Should this Court consider the

Petitioner's "good faith" argument where the same was not raised in the lower Courts, as per Illinois vs. Gates, 33 Criminal Law Reporter 3109?

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STATEMENT OF THE CASE

The Respondent accepts in large part the Statement of the facts of the case as contained in the Statement of the Case contained in the Petitioner's Petition for a Writ of Certiorari; however, the Respondent objects to the factual arguments contained therein, which represent unwarranted conclusions that the Commonwealth has chosen to draw from the lower Court record. Certainly, the Respondent does not contend that this Court should not carefully examine the Affidavit offered in support of the search warrant to the extent necessary to determine the constitutional questions presented by the Commonwealth's petition. Nevertheless, that part of the Commonwealth's Statement of the Case which contains extraneous factual discussions concerning the evidence presented at the

trial should be disregarded by this Court.

Furthermore, the Respondent wishes to note that in its search of the Defendant's office, the Commonwealth's officers, consistent with the authority provided by the warrant challenged herein, seized 3,600 patient records, or all of Dr. Santner's business records. Although the Commonwealth had every opportunity at that time to have its officers seize only those records which were in fact supported by probable cause as contained in the Affidavit, the officers elected to follow the overly broad authority provided to them by the Magistrate and seize all those records. Nevertheless, at the time of trial, only fifty (50) of those records were offered into evidence.

It should also be noted that, pursuant to the identical search warrant (with only the address changed), the Commonwealth

searched the residence of the Respondent and seized certain ledgers which were also used as evidence against the Respondent at trial.

REASONS FOR DENYING THE WRIT

A. THE PENNSYLVANIA COURTS DID NOT HOLD THAT A SEARCH WARRANT MUST SET OUT WITH "EXACTING PARTICULARITY" THE ITEMS TO BE SEIZED; RATHER, THE STATE COURTS HELD THAT A SEARCH WARRANT WOULD BE VOID DUE TO OVERBREADTH, WHICH IS SUPPORTED BY PRIOR DECISIONS OF THIS COURT.

The Petitioner contends in his Petition for Writ of Certiorari before this Court that the Pennsylvania Courts in the instant matter have held that "exacting precision" is required by police officials in naming the items to be seized via a search warrant. This argument completely misconstrues the holding of the Pennsylvania Superior Court below.

The learned Edmund B. Spaeth, President Judge of the Superior Court of Pennsylvania, in his Opinion for that Court, merely held that where a search warrant provides authority to the executing officers to seize

all of the business records of a physician while the affidavit in support of probable cause attached thereto merely provides a limited range of probable cause for seizures, the results of the execution of that warrant must be excluded as evidence because of the overbreadth doctrine; ie.,a warrant which gives its executing officers the authority to "cart away all documents" cannot be sustained unless the affidavit in support of probable cause gave sufficient probable cause to authorize the Magistrate to allow such a total seizure of records. See Judge Spaeth's Opinion attached as Appendix "B" to the Commonwealth of Pennsylvania's Petition for a Writ of Certiorari.

Therefore, the question presented herein is not whether the Constitution requires that search warrants describe items

to be seized within a particular generic class "with precision and exacting authority" (Commonwealth's Petition, page 9); rather, the only question is whether or not the Pennsylvania Courts acted within the United States Constitution by electing to suppress the results of a seizure pursuant to a search warrant which was clearly void for its overbreadth. Many federal cases have held that such seizures are unconstitutional and that suppression is warranted in such circumstances. Andresen vs. Maryland, 427 U.S. 463 (1976); Coolidge vs. New Hampshire, 403 U.S. 443 (1971); United States vs. Marron, 275 U.S. 192 (1972); Application of Lafayette Academy, 610 F.2d. 1 (1st Circuit, 1979); Vonder Ahe vs. Howland, 508 F.2d. 364 (9th Circuit, 1974).

As noted in the Opinion of the

Pennsylvania Superior Court, it would have been relatively easy for the Affiants to have drawn up a warrant in this case which tailored its authority to the affidavit in support of probable cause; e.g., as to which patients' files would be seized, the period of time of the patients' visits in question, or other such factors as reviewed at page 29a of the Commonwealth's Petition.

It must be noted that where a warrant seeks to seize records of patients of a physician, the situation is not the same as where a warrant is attempting to confiscate contraband or stolen drugs. As stated in a leading opinion on this subject, in United States vs. Abrams, 615 F.2d. 541 (1st Circuit, 1980):

> "Business records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods. The government has cited no case and we have found none in

> which a seizure of all records was held valid pursuant to a generally ordered warrant such as we have here."

Thus these items at issue were not "difficult or impossible to describe" (Commonwealth's Petition, page 14); nor were they the end product of a wholly illicit enterprise, such as a drug manufacturing operation. The use at trial of only fifty (50) of the 3600 files seized shows how this indiscriminate seizure reached both innocent and inculpatory materials.

Accordingly, the Respondent respectfully submits that there is no issue before this Court in the present case wherein the Petitioner could properly contend that the lower Court required more than "a reasonable degree of specificity" concerning the items to be seized; rather, the lower Court's decision was based upon the overbreadth

doctrine and no more. Therefore, there is no reason for this Court to exercise discretionary review.

B. SUPPRESSION OF ALL OF THE BUSINESS RECORDS OF A PHYSICIAN SEIZED PURSUANT TO AN OVERLY BROAD SEARCH WARRANT WAS AN APPROPRIATE REMEDY TO PRESERVE AND PROTECT THE FOURTH AMENDMENT INTERESTS OF THE RESPONDENT.

In its Petition, the Commonwealth of Pennsylvania argues that the Pennsylvania Superior Court erred by suppressing all items seized pursuant to the overbroad warrant in question.

Initially, it must be noted that this argument was not presented to the Pennsylvania Superior Court by the Commonwealth of Pennsylvania. Accordingly, the Commonwealth does not fairly argue to this Court that the Superior Court of Pennsylvania was in error in failing to narrow its grant of relief as urged here by the Commonwealth of Pennsylvania.

This Court has recently reaffirmed the principle that it will not decide claims

"not pressed nor passed upon" in State Court. Illinois vs. Gates, No. 81-430 (June 8, 1983); State Farm Mutual Automobile Insurance Company vs. Duel, 324 U.S. 154, 160 (1945).

Dealing however with the merits of the Commonwealth's contention, it is clear that the Commonwealth is not entitled to a modification of the relief ordered by the lower Court. An examination of the Argument contained in the Commonwealth's Petition for a Writ of Certiorari at pages 17-23 of this issue reveals that the Commonwealth is unable to tell this Court which items it contends should be allowed to remain admissible notwithstanding the order suppressing the warrant as void for overbreadth.

The reason for the Commonwealth's difficulty in this regard is that its

executing officers in the act of seizure took control of 3600 records of the Respondent's patients in one fell swoop. These officers simply carted away all the documents based upon the general authority contained in the warrant; Application of Lafayette Academy, supra at 3. Therefore, it is difficult if not impossible to argue that such a seizure, which took place as one act at one time by the executing officers pursuant to this invalid warrant, can now be divided among the good and the bad, the admissible and the inadmissible, the constitutional and the unconstitutional.

Additionally, the Respondent urges upon this Court to consider the chief purpose of the exclusionary rule, that is, to deter police abuse of the Fourth Amendment rights of citizens by denying to the police the use in Court of evidence seized in violation of

these principles. If this Court were to allow "redaction" in the instant situation, it would be sending a message to police personnel that, if they were possessed of general authority to seize all records in a similar situation, they could proceed to do so, and worry later about which records would be suppressed. There is no incentive under such a result for the executing officers to narrow their seizures to those items which are truly supported by the probable cause contained in the affidavit in support of the search warrant; rather, the officers would simply continue to cart away all the documents in one fell swoop as they did in the instant case, and hope that later on the Courts would do no more than narrow the exclusionary order to those items which were in fact supported by probable cause.

A further difficulty with such a result

would be that the Commonwealth and other law enforcement authorities would be provided with the benefit of an "investigatory dragnet" which, according to United States vs. Abrams, supra, is exactly the kind of situation that the Fourth Amendment was designed to prevent. The police could then take the records in question back to their office and examine them to determine in which direction their investigation should go, not having to worry about whether or not all of those records that were seized in total would be suppressed.

Accordingly, as a matter of policy under the Fourth Amendment, the Respondent contends that the remedy of total suppression in a situation such as this was appropriate.

Respondent further notes that the Commonwealth has once again misconstrued the

holding of the lower Court, as it argues (page 21) that law enforcement officials should "not be punished in a sweeping manner by the Courts without regard for the properly drafted portions of warrants". In the instant case, the warrant had no improperly drafted portions, except that part which permitted the officers to seize all of the patient records of the Respondent. Therefore, there is nothing to redact and nothing to save, since the fault of the warrant lies in its overly broad authority. Whatever error may be present in this situation is not the fault of the executing officers, who merely acted pursuant to the authority wrongfully and excessively granted to them by the Magistrate who issued the warrant.

While severance may or may not be an appropriate remedy where the scope of the

search actually is limited by the terms of the Magistrate's authorization, such is not the situation instantly as above noted. Since no items were seized pursuant to a valid portion of the warrant (all the items were seized pursuant to the invalid authority provided therein), the remedy of severance or redaction is inappropriate in this particular case, even if it is constitutionally permissible, a point which your Respondent does not concede even for the purposes of this Argument.

This case then is not the appropriate vehicle for this Court to engage in a judgment that severance or redaction is a valid limitation on remedies to be granted in suppression cases under the Fourth Amendment.

C. THIS COURT SHOULD NOT CONSIDER THE PETITIONER'S "GOOD FAITH" ARGUMENT WHERE THE SAME WAS NOT RAISED IN THE LOWER COURTS.

This case is similar to that of Illinois vs. Gates, 33 Criminal Law Reporter 3109, wherein this Court refused to consider the merits of an argument that there is a good faith reliance exception to the exclusionary principle since the Commonwealth concedes that this assertion is being raised for the first time in the instant appeal.

The Pennsylvania Supreme Court, which also refused discretionary review of this decision of the intermediate Pennsylvania Superior Court, was not even presented with this issue in the Commonwealth's Petition for Allowance of Appeal to that Court. There can be no question therefore that the issue, having not been properly preserved pursuant to Illinois vs. Gates, supra,

should not be considered on its merits by this Court.

CONCLUSION

For all the foregoing reasons, the Respondent, Floyd Santner, respectfully requests that the Supreme Court of the United States refuse to issue a Writ of Certiorari to the Pennsylvania Supreme Court in the instant matter.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

I, A.CHARLES PERUTO, Esquire hereby certify that a true and correct copy of the within annexed Brief in Opposition to Petition for Writ of Certiorari, has been duly served upon Vram Nedurian, Jr., Esquire, Assistant District Attorney, Delaware County Courthouse, Media, Penna. 19063.

A. CHARLES PERUTO, Esquire

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 10th DAY
OF October, 1983.

CLARA SCHWARTZ
Notary Public, Phila., Phila. Co.
My Commission Expires Feb. 1, 1986